35035-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROY MURRY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the State present sufficient evidence to support the defendant's conviction for attempted first-degree murder of Ms. Murry?

2. Did the State present sufficient evidence to support the defendant's three convictions for aggravated first-degree murder and first-degree arson?

3. Assuming "premeditation" is an essential element of attempted first-degree murder, did the face of the information, when construed liberally, provide sufficient notice of "premeditation," as it applies to attempted first-degree murder?

4. Should this Court direct a judgment of attempted second-degree murder if the information did not provide sufficient notice of premeditation as it applies to attempted first-degree murder?

5. Was evidence relating to Murry's various firearms found by law enforcement during their investigation relevant in the triple homicide? If error, was it harmless?

6. Was the unobjected-to evidence describing Murry as a "prepper" relevant to establish his plan and ability to commit the charged crimes? If error, was it harmless in the context of all the other evidence presented at trial?

7. Was evidence of the defendant's unorthodox belief system (e.g., that his wife and mother-in-law were Russian agents), in conjunction with evidence that the defendant trusted relatively few individuals, relevant? If error, was it harmless?

8. Was the introduction of certain song titles researched by the defendant and posted by him on Facebook, in conjunction with his simultaneous internet research regarding ignition sources to start fires, a day before the murders and arson, relevant to establish Murry's plan and intent to commit the murders and the gasoline-fueled arson of the residence?

9. If the defendant objected to introduction of the song titles at trial for lack of foundation, can he now raise a different ground on appeal? If error, was it harmless?

10. Was introduction of the defendant's social media monikers used by him when communicating with Ms. Murry on social media prejudicial? If error, was it harmless?

11. Has the defendant preserved and established a violation of the statutory husband/wife/domestic partner privilege, RCW 5.60.060(1), regarding his wife's testimony at trial, in a domestic violence case?

12. Has the defendant established that his counsel was ineffective for failing to raise his competency to stand trial if there was no evidence presented that the defendant could not understand the charges against him and participate in a rational defense?

13. Did the trial court err when it determined that the use of a Transmission Electron Microscope to compare nanoparticle materials met the *Frye* standard?

14. Should this Court remand to the trial court to strike the $200.00 filing fee imposed at sentencing?

II. STATEMENT OF THE CASE

The defendant was charged and convicted of three counts of premeditated murder with aggravating circumstances.[1] He was also charged and convicted of one count of attempted first-degree murder of his wife, Amanda Murry, and one count of first-degree arson for the fire started in the Canfield home. CP 1-2, 1204, 1207, 1210. 1213-14.

1. Substantive facts.

Lisa Constable had three children, which included Amanda Murry,[2]

[1] His mother-in-law, Lisa Canfield; his father-in-law, Terry Canfield; and brother-in-law, John Constable, were the victims. CP 1-2.

[2] At the time of trial, Ms. Murry had legally changed to her maiden name "Constable." She will be referred to as "Ms. Murry" for clarity and identification in the response brief.

and John Constable. RP 2681, 3325-26. Lisa Constable (hereinafter "Canfield") subsequently married Terry Canfield and moved into his residence located at East 20 Chattaroy Road. RP 2685-86. Amanda Murry and John Constable also eventually moved into that residence. RP 2686. The Canfield home was situated in a rural area in north Spokane County. RP 1506; Ex. 52, 54.

Ms. Murry and the defendant began dating and became engaged on December 31, 2010. RP 2698-99. In 2012, they moved to Lewiston, Idaho. RP 2712-13. They married on August 31, 2013. RP 2703. During the marriage, Ms. Murry worked as a registered nurse at Sacred Heart Medical Center in Spokane. RP 2691, 2742-43, 2847. After obtaining that job, Ms. Murry moved from Lewiston to the Canfield home in Chattaroy, planning to live there until she and the defendant could afford an apartment in Spokane. RP 2743, 2751. Ms. Murry paid the bills for the Lewiston apartment where Mr. Murry continued to live. RP 2744, 2751.

During their marriage, the defendant's behavior began to concern Ms. Murry, as the defendant placed a high value on loyalty, and demanded Ms. Murry maintain his trust and loyalty. RP 2754, 2734-36. He trusted few other people, and developed an unwavering grudge against those he did not trust. RP 2735. The defendant routinely told Ms. Murry that he had a "shit list" of people who had betrayed him, and, if the opportunity availed itself,

he would kill those individuals on his "list." RP 2893, 2897. Mr. Murry became increasingly volatile, frustrated and angry over his marriage to Ms. Murry. RP 2733-34, 2771, 2832, 3106-07.

As the marriage continued to sour, Ms. Murry told the defendant she wanted a legal separation because of his illogical behavior and his growing independent use of their finances. RP 2764-68, 2770, 2854. For example, the defendant spent a large amount of money and used the couple's credit cards without Ms. Murry's consent. RP 2768-69. The defendant's acceptance of a "legal separation" varied from believing it was logical to becoming agitated, asserting Ms. Murry should file for divorce. RP 2773-74. However, Ms. Murry was afraid to reveal to the defendant that she ultimately wanted a divorce because of his concerning behavior. RP 2772-74.

In December 2015, the defendant complained to Ms. Murry that her family had too much influence over her. RP 2751-52. He lamented that her family was "poisoning [her] against him." RP 2752-53. The defendant also angrily told a friend that "[h]e hated that [the family was] blaming him for…their family's issues and [was] trying to get in between him and his wife and make his wife choose her family over him." RP 3104; *see also* 3008, 3012, 3020, 3102. In early 2015, Mr. Murry remarked to another friend that he no longer trusted Ms. Murry. RP 2501-02. At that time, he

claimed that Ms. Murry was working with foreign governments. RP 2502. Also, the defendant told a friend that he could not trust his wife because she was a Russian agent. RP 2989.

Shortly before the murders, the defendant visited one of his best friends in Seattle. RP 2335-36, 2339. Angry and upset,[3] Mr. Murry told his friend that he was separated from Ms. Murry and it was her fault. RP 2340. He stated his wife's family was part of the problem. RP 2341.

2. Events preceding the murders and arson.

On May 24, 2015, from 9:15 p.m. to 11:03 p.m., 25 hours before the murders, the defendant conducted several internet searches from the Lewiston apartment. RP 3239-45. He searched for songs, including "Gasolina," "Burn it down," "Face Everything and Rise," and "Revolution." RP 3239. He also searched Amazon and Wikipedia for "GI Trioxane," a solid fuel component, which comes in different shapes and sizes, and will burn for a certain time depending on its size, in addition to other fire burning materials. RP 3242-43. He also completed three Google searches for "cannon fusing," which is a time-delayed fuse. RP 3243-45. Then, between 7:34 a.m. and 7:43 a.m. on May 25, 2015, 17 hours before the murders, the defendant posted the YouTube videos for "Gasolina,"

[3] The defendant ordinarily appeared "very cool and level-headed." RP 2344.

"Face Everything and Rise," and "Revolution" to his Facebook page. RP 3237-39, 3270.

Prior to leaving for work on May 25, 2015, Ms. Murry spoke with the defendant by telephone at 1:44 p.m. RP 2785, 3217-18. The defendant stated they should get a divorce. RP 2787. His behavior was out of character, as he sounded very friendly. RP 2787-88. The defendant also gibed that he hoped that Ms. Murry and her male friend, Chris Sanders,[4] were very happy. RP 2788-89. Before the conversation ended, Ms. Murry told the defendant she was working at the hospital that day. RP 2788. The defendant knew Ms. Murry's normal shift was from 3:00 p.m. to 11:30 p.m., and routinely returned home to the Chattaroy address around 12:15 a.m. RP 2389, 2782-84. However, that day Ms. Murry unexpectedly worked an overtime shift, from 3:00 p.m. to 3:38 a.m. on May 26, 2015; she was still at work when the murders occurred. RP 2388, 2795.

3. The events of May 26, 2016.

Around 12:30 a.m., neighbors of the Canfields heard three to five gunshots. Hicks RP 356-57, 367. A second volley of gunshots followed approximately one-half hour later. Hicks RP 368. Around 2:00 a.m., a

[4] Mr. Sanders was like a brother to Ms. Murry and was one of her best friends. RP 2710. Although there was no romantic involvement, the defendant became suspicious of Ms. Murry and Mr. Sanders in the spring of 2015. RP 2711-12, 2954, 2956-57.

neighbor heard what sounded like a sudden rush of fire; he heard a second rush of fire approximately 15 seconds later. Hicks RP 326-28. He observed the back of the Canfield home was on fire; he called 911. Hicks RP 328-29. The neighbor yelled and banged on the residence with no response. Hicks RP 332, 334.

At 2:08 a.m., Spokane County Fire District 4 responded to the fires. RP 1422, 2051. The first responders located Lisa Canfield, who was unclothed, inside the master bedroom. RP 1423-25, 1462-63, 1465, 1472-73, 1615, 1827, 1842; Ex. 60. She had a cloth stuffed into her mouth. RP 1426, 1464; Ex. 463, 464. The residence sustained significant fire damage; the south and west end were nearly a complete loss. RP 1834.

After her late arrival home,[5] Ms. Murry attempted to call Mr. Murry at 4:38 a.m. RP 3331-32. The call went to defendant's voice mail. RP 3331. He later returned her call at 7:40 a.m. RP 2808, 3219, 3232, 3277. The defendant's cell phone was inactive for approximately 18 hours, from May 25, 2015, at 1:40 p.m. (after speaking to Ms. Murry about a divorce) to May 26, 2015, at 7:40 a.m. (the return call to Ms. Murry). RP 3219, 3231-32, 3277-78. The defendant's cell phone was in the physical location near the Lewiston apartment based upon its GPS coordinates for both the 4:38 a.m.

[5] Ms. Murry was distraught and appeared to be shocked after being told about her mother's condition at the scene. RP 1427.

call and the 7:40 a.m. return call. RP 3232-33, 3235, 3249-50. Likewise, Mr. Murry's home computer was logged off on May 25, 2015, at 10:30 a.m., and he did not log back on until the evening of May 27, 2015, at 7:48 p.m. RP 3877.

Approximately ten hours after the murders, Selina Blimka, an acquaintance of the defendant, was working at a Clarkston, Washington, tobacco shop, when the defendant entered the business. RP 2255-57. Normally calm, he paced back and forth. RP 2259-60. He briefly left the store and returned with a large box of Trioxane bars, in their original packages, and gave eight boxes to Ms. Blimka. RP 2260, 2262-64, 2274-75. The defendant said the Trioxane could be used to start a fire, with the aid of gasoline, kerosene or the like. RP 2264. With a smirk, the defendant remarked that he knew someone who had started some fires, but could not reveal that person's identity. RP 2265.

Later that afternoon, after the murders had been broadcast on the news, Tim Carson, Mr. Murry's friend, met him in Spokane. RP 3292, 3298-3300, 3306-07, 3310-11. Mr. Carson asked if Mr. Murry's in-laws were alright; the defendant responded by making a slashing motion across his neck. RP 3293. Karen Carson, also asked about Ms. Murry's family and the defendant again made a slashing motion across his neck; Ms. Carson found the defendant's response extremely odd, which compelled her to

leave the room. RP 3318-19.

4. Investigation of the murders and arson of the residence.

Detectives responded to the murder scene the following morning on May 26, 2015, and obtained a search warrant.[6] RP 1500-01, 1835-36, 2224. Investigators observed footprints on the door to the residence and damage to the door-jamb from a forceful entry. RP 1558-59; Ex. 131, 132. Mr. Murry had previously trained Ryan Constable how to effectively kick open a door. RP 3343.

During the initial walk-through of the home, John Constable was discovered in the kitchen. RP 1501-02, 1721-22, 1845-46, 1853; Ex. 237. There was a strong smell of gasoline in the home, which was later confirmed by forensic analysis. RP 1685, 3605-07, 3614. Detectives and arson investigator, Doug Bleeker,[7] documented fire damage in the hallway, the Canfield's master bedroom, Ms. Murry's bedroom, the bathroom, and the kitchen. RP 1579, 1590, 1638-41, 1643-44, 1650-54, 1712-15, 1728, 1753-54, 1798; Ex. 193, 301, 153, 393, 447, 724-26.

The master bedroom bed had extensive fire damage, a blood stain was observed on a pillow and sheet on the bed, and the K-9 alerted to an

[6] The investigation, in part, included collecting evidence by x-raying and sifting through fire debris, which lasted approximately ten days. RP 1676-77, 1812, 1926.

[7] Investigator Bleeker was assisted by a certified K-9 accelerant detection dog. RP 2010-11, 2045-49.

accelerant on the pillow and in Ms. Canfield's hair. RP 1599, 1614, 1621, 1623-24, 1627, 1658-59, 1792-93, 1894-95, 1897-98, 2121; Ex. 173, 174, 180, 181, 198, 201, 205. Three spent .22 caliber shell casings were collected from the bedroom. RP 1860-71. Investigator Bleeker concluded there was a gasoline pour pattern from Ms. Canfield's body (bedroom), to Mr. Constable's body (kitchen), and then toward the front door. RP 2010-12, 2016-17, 2038-39, 2128-30, 2123-24, 2138, 2148; Ex. 331, 440, 580, 581, 582, 585. The accelerant was gasoline, but the ignition source (e.g., a lighter, match, trioxane, flare cap, etc.) could not be conclusively determined or discounted. RP 2132, 2137, 2140-42. Investigator Bleeker determined the cause of both fires was purposeful and the house fire did not cause the fire in the shed. RP 2130, 2133.

In 2010, the defendant gave Ms. Murry a Taurus .38 caliber short-nose, blued revolver as a gift. RP 2745. Ms. Murry took the revolver when she moved to the Chattaroy residence. RP 2745-47, 2746-47. The firearm remained in Ms. Murry's bedroom, when she left for work on May 25, 2015. RP 2750. The firearm was the only item taken at the time of the murders. RP 1752-53, 1917, 1940, 1987, 2747, 3884. No other items of value commonly associated with burglary were taken; items left behind included ammunition, multiple other firearms, computers, a safe, wallets, a camera, purses, cell phones, and $3000 cash on Ms. Murry's nightstand. RP 1676,

1696, 1699-1702, 1705-7, 1732-44, 1738, 1751, 1770, 1788, 1873, 1882-85, 1888-89, 1895-97, 1900, 1902-04, 1908, 1954.

5. Investigation of the shed.

The shed was situated between the barn and the residence, and was a total loss from the fire. RP 1497, 1519, 1522, 1540-41, 1545, 1549-51, 1772; Ex. 68, 71, 93, 95, 99, 124, 412. Terry Canfield's badly burned body was found inside the shed. RP 1545, 1660, 1749, 1843-44; Ex. 47, 48. Traces of gasoline were found near Mr. Canfield's body. RP 2104-05.

6. Search of defendant's car.

The defendant's Dodge Caliber was collected, towed, stored and a search warrant was obtained. RP 2470, 2480-81, 2486, 2517-18, 2651. Inside the vehicle, detectives collected a Walther P22 caliber semi-automatic handgun, several .22 caliber cartridge cases, a small vial of yellowish liquid with a teal cap, an eyedropper, and a replacement barrel for the .22 caliber firearm.[8] RP 2539-42; Ex. 782, 855, 857. A box of Trioxane and a Remington brand headlamp (a light affixed to an elastic strap) were also discovered. RP 2033-35, 2553-55, 2565; Ex. 859.

7. Autopsy.

[8] The crime lab did not identify any useful DNA or fingerprints on any collected evidence. RP 3417-37. 3696-29. In that regard, the defendant routinely took steps to prevent leaving fingerprints on ammunition. RP 2725-27, 3331, 3347.

Lisa Canfield had sustained twelve separate gunshot wounds to her arms, fingers, hands and chest. RP 4025-27, 4014-16, 4021, 4032, 4036. She had stippling marks in her lower neck and chest areas, which, in general, means the firearm was fired within one to three feet of the body. RP 4033-35, 4037. She died before the fire was set. RP 4037-39.

Terry Canfield had six or more separate gunshots wounds[9] (to his head, chest, and abdomen) and died before the fire was started. RP 4050, 4057-58, 4060-64, 4067-69, 4074-75, 4071, 4078-79.

John Constable died from multiple gunshot wounds. RP 3977, 3979. He was shot in his left temple, left neck, and chest; each shot was fatal. RP 3987, 3991-93. Additionally, he sustained a gunshot wound to the back of his neck. RP 3995-97.

Several bullets and bullet fragments were collected from the bodies. RP 1970-76, 1995-97, 1998, 2473-75. The bullets and fragments were consistent with .22 caliber rimfire ammunition and were fired from the same weapon. RP 3657-61, 3675-76. The defendant had two Walther P22 caliber semi-automatic handguns in his possession in the spring of 2015. RP 2742, 2968, 3075-76, 3078-79. Detectives did not locate one of the defendant's Walther handguns during their investigation. RP 4092-93. Barrels for that

[9] The distance from which the shots were fired could not be determined because of the extent of the thermal injuries. RP 4083.

weapon were easily interchangeable and additional barrels were available in this area at the time of the murders. RP 3652-53. The defendant remarked to a friend that a .22 caliber was "the sniper's choice of caliber." RP 2918-21.

8. The Lewiston apartment.

On May 31, 2015, a search warrant was granted for the defendant's Lewiston apartment. In addition to collecting potential evidence, detectives found the Murrys' marriage announcement and photographs of their wedding in the apartment's dumpster. RP 2645; Ex. 718.

9. Defendant's version of events to law enforcement and friends.

The defendant told a friend that he had been camping alone in Idaho at the time of the murders. RP 2970. However, he told Detective Keyser[10] that he had been camping with five "unnamed" friends.[11] RP 3809, 3836. The defendant originally told the detective he slept on the ground while camping. RP 3880. The defendant stated he still had the sleeping bag. *Id*. Detective Keyser remarked to the defendant that materials on the sleeping bag (such as dirt) could place him at that location. *Id*. The defendant changed his story and asserted he had slept in his car. *Id*.

[10] The trial court conducted a CrR 3.5 hearing and admitted the defendant's statements to law enforcement. CP 1125-41.

[11] This statement could not be corroborated. RP 3855-56, 3859-60, 3869-70.

10. Defendant's proficiency with firearms and tactical training.

Generally, the defendant always wore a firearm, and was described as a marksman. RP 2280, 2285, 2312, 2343, 2351, 2369, 2504, 2987-88, 3097, 3105, 3126-27. One of the defendant's friends described his aptitude with firearms as "beautiful." RP 3126-27. The defendant had described to several people how to "clear" a room with a rifle, and to "pie your angles," by checking every angle when maneuvering through a room. RP 2315, 3075.

11. AccuDure lubricant found in the defendant's car.

Pavlo Rudenko,[12] PhD., was one of forty people certified as a lubricant and grease specialist. RP 3452. Dr. Rudenko specialized in and worked with nanoparticles, attempting to replace toxic additives in lubricants with more benign materials, with an emphasis on firearm lubricants. RP 3453-54. He developed a firearm lubricant additive consisting of "magnesium silicate nanoparticles." RP 3457. Ultimately, he named this product "AccuDure," which is a nanoparticle, protective lubricant coating for a firearm barrel that prevents friction and wear on the barrel. RP 3458-61. When viewed under a microscope, there are unique differences between AccuDure and other market oil-based firearm

[12] Dr. Rudenko had a master's degree in physics and a doctoral degree in material science, both from Washington State University. RP 3452.

lubricants. RP 3462-65. Given the specific ratio of magnesium to silicate in the chemical composition of AccuDure, it is unlikely that it occurs as a natural substance. RP 3465, 3519.

Dr. Rudenko met the defendant in 2013. RP 3466. During the development phase of the lubricant, the men experimented with and tested the product. RP 3467-68. The defendant was given a full vial of the lubricant and used the product in his own gun barrels. RP 3469, 3508-09. The defendant kept the product in a gun case, which also included an eyedropper, a small vial, the P22 Walther pistol, and the drop-in barrel. These items were found in the defendant's Dodge Caliber when it was searched. RP 2540-41, 3470-71. Dr. Rudenko identified the items taken from the defendant's car as those items used during the 2013 experiments. RP 3471.

At the time of the murders, only two vials of lubricant existed – one in the defendant's possession and one in Dr. Rudenko's possession.[13] RP 3471-72, 3526. Dr. Rudenko knew of no other product with the same chemical composition as AccuDure. RP 3457, 3529-31. During the investigation, Dr. Rudenko provided his vial of the lubricant to law

[13] No other person had access to this specific formula. RP 3480-81. Only two vials had been taken from that particular batch; the remainder of that batch of lubricant formula was later destroyed. RP 3474-75, 3480-81.

enforcement for testing and comparison. RP 3471-72. At the time of trial, AccuDure had not been sold to the public. RP 3461.

With a master's degree in geology and having worked in trace evidence analysis since 1987, Washington State Patrol forensic scientist, William Schneck, reviewed and analyzed a shell casing collected in the master bedroom of the residence. RP 3538, 3564. Mr. Schneck analyzed 950 samples of materials collected at the crime scene, finding no other pieces of evidence contained the same particles as those found on the master bedroom spent firearm cartridge. RP 3563, 3565, 3588. Mr. Schneck had never before seen the same chemical composition of the AccuDure collected from Mr. Murry's car, which had the same composition found on a shell casing from the bedroom. RP 3556-66. An ingredient of AccuDure is lizardite (composed of magnesium silicate particles), a clay imported from China; lizardite is not found near Spokane RP 3570-71.

A sample of AccuDure and eight crime scene shell casings were transported to a private, nanoparticle research firm, MVA Scientific Consultants, an accredited laboratory in Atlanta, Georgia. RP 3566-70, 3573, 3909-10, 3912, 3922-23. The WSP crime lab also sent MVA ten laboratory test fired 22-caliber cartridges. They had been fired sequentially through a WSP lab owned 22-caliber pistol - five had been fired from a barrel treated with AccuDure, and five were not. RP 3577-78, 3663-66.

Senior forensic microscopist, Richard Brown, had worked at MVA for 25 years. RP 3902. He was trained to isolate and identify small particles using a combination of microscopic techniques – scanning electron microscopy (SEM) and transmission electron microscopy (TEM). RP 3904. Much of his work involved the identification of nanoparticles. RP 3905-06.

In the present case, Mr. Brown isolated and separated the solid particles from the liquid in the AccuDure lubricant. RP 3924-25, 3928. Mr. Brown also analyzed the cartridges from the crime scene to determine if there were any particles on those casings that were consistent with the particles in AccuDure. RP 3930-31. He determined that three[14] shell casings had magnesium silicon acini form particles consistent in morphology,[15] elemental composition and shape with the nanoparticulate in AccuDure. RP 3936-39. He, too, had never before observed this specific particle composition. RP 3941.

Mr. Brown also analyzed the WSP test-fired cartridges. RP 3942-43. Mr. Brown found the *same* elemental composition and morphology on the test cartridges treated with AccuDure as previously found and identified on the three spent crime scene cartridges, yet found no similar composition

[14] Mr. Brown did not find magnesium silicon acini form particles on the remaining five crime scene cartridges. RP 3936-37.

[15] A branch of biology that deals with a particular form, shape, or structure. https://en.oxforddictionaries.com/definition/morphology (last visited Feb 1, 2019).

or morphology on the untreated test cartridges. RP 3944-45, 3948-49.

12. Defendant's statements to his sister after his arrest.

After Mr. Murry's arrest on May 30, 2015, his sister confronted him about the murders. The defendant acted, "[l]ike it was a good thing. He was smiling and said, 'oh my gosh, national news,' like -- like it was a positive thing." RP 2650, 3082. He remarked that Spokane would pay, as he "rubbed his two fingers together 'like money.'" RP 3083. Calmly, the defendant remarked, "they weren't going to find anything." RP 3083. Overall, the defendant appeared upbeat and unaffected by the murders. RP 3083, 3085.

III. ARGUMENT

A. SUFFICIENT EVIDENCE EXISTED FROM WHICH A JURY COULD FIND MURRY GUILTY OF ATTEMPTED MURDER.

The defendant first challenges the sufficiency of the evidence for the attempted first-degree murder conviction regarding his wife, Ms. Murry, arguing the evidence did not show he took a substantial step toward commission of that crime. Br. at 12-14.

Standard of review.

In reviewing a sufficiency challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Such a claim admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1); *State v. Nelson*, 191 Wn.2d 61, 71, 74, 419 P.3d 410 (2018); CP 1191; RP 4138. A "substantial step" is conduct that is "strongly corroborative of the actor's criminal purpose." *In re Borrero,* 161 Wn.2d 532, 539, 167 P.3d 1106 (2007); CP 1193; RP 4138.

A person commits first-degree murder when, "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a). Intent may be inferred from the defendant's conduct. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Evidence of intent can include the manner and act of inflicting the wound, the nature of the prior relationship, and any previous threats. *State v. Mitchell*, 65 Wn.2d 373, 374, 397 P.2d 417 (1964). Likewise, marital discord between the defendant and victim can establish motive and intent to commit a murder.[16] *See State v. Powell*, 126 Wn.2d

[16] S*ee also People v. Williams,* 23 Cal. App. 5th 396, 410, 232 Cal. Rptr. 3d 671, 682 (Ct. App. 2018) (anger at the collapse of the defendant's marriage was relevant to establish a motive); *State v. Lodermeier,* 539 N.W.2d 396, 398 (Minn. 1995) (deterioration of a couple's marriage, an argument between the defendant and victim the night before the killing, and the defendant's anger toward the victim provided evidence of premeditation);

244, 247, 893 P.2d 615 (1995). Similarly, there are a wide range of facts from which a jury may infer premeditation; motive, procurement of a weapon, stealth, planning the crime, and the method of killing are "particularly relevant" in establishing premeditation. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Conduct such as "lying in wait" can demonstrate a substantial step. *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993); *see also In re Francis*, 170 Wn.2d 517, 526, 242 P.3d 866 (2010); *State v. Newbern*, 95 Wn. App. 277, 287, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999).

Here, a rational trier of fact could conclude that Mr. Murry had motive to kill Ms. Murry; their marriage had deteriorated to the point of divorce resulting in the defendant harboring a grudge and hatred against Ms. Murry and her family. Furthermore, the defendant engaged in detailed activity directed toward killing Ms. Murry. The defendant researched committing murders and arson, searching for combustible fuels and a song which featured gasoline on the internet the night before the murders. The defendant travelled from Idaho to Colbert, Washington, to commit the attempted murder. He arrived uninvited, and forcefully entered the Canfield

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People v. Fisher, 449 Mich. 441, 453, 537 N.W.2d 577 (1995) (same); *Gattis v. State*, 637 A.2d 808, 818 (Del. 1994) (same); *Com. v. Borodine*, 371 Mass. 1, 8, 353 N.E.2d 649 (1976) (same); *State v. Patterson*, 200 Kan. 176, 182, 434 P.2d 808 (1967) (same).

residence at 12:16 a.m. At that point, Mr. Murry believed Ms. Murry had returned home from work, and had no knowledge she was working an overtime shift into the morning hours.

It could be reasonably inferred that the defendant took a substantial step and intended to kill Ms. Murry because he purposefully waited at the crime scene for one and one-half hours after killing the family members for Ms. Murry's return; he did not immediately flee. Otherwise, common sense dictates he would have immediately set fire to the home and shed and fled the scene to avoid apprehension. His risk of apprehension increased considerably as he prolonged his planned departure from the crime scene. His goal of waiting to kill Ms. Murry, rather than immediately fleeing the area, was greater than his risk of apprehension and the consequences of the unknown (i.e., whether someone had called the authorities after his first or second volley of gunshots). The only reason he remained at the property was that he intended to kill Ms. Murry upon her return – his objective for going to the Canfield property in the first instance.

Also, the defendant fired multiple kill shots into Ms. Murry's family members, and, after a prolonged period, cruelly started their bodies on fire. A jury could reasonably infer from the defendant's vicious conduct that he grew angry and increasingly frustrated when Ms. Murry did not return home as he expected.

In conjunction, the defendant had multiple motives to kill Ms. Murry. First, as evidenced by his statement to Ms. Murry the day before the murders, he was jealous of Ms. Murry's friendship with Mr. Sanders. *See State v. Groth*, 163 Wn. App. 548, 565, 261 P.3d 183 (2011), *review denied*, 173 Wn.2d 1026 (2012) (jealousy can be a motive for murder).

Second, the defendant believed Ms. Murry was treating him poorly. After Ms. Murry took the job in Spokane, the marriage increasingly worsened. The defendant remarked to several friends that Ms. Murry was treating him unfairly, and that she was trying to leave him to be with her family. His behavior toward Ms. Murry became increasingly volatile and unpredictable. A jury could reasonably infer the defendant believed Ms. Murry had breached his trust and loyalty, ultimately causing the defendant to want to kill her.

In sum, a jury could reasonably infer the defendant took a substantial step toward the commission of the first-degree murder of Ms. Murry when he forcibly entered the Canfield home, armed with one or more firearms and ammunition, violently killed her family members, and then patiently lay in wait to kill Ms. Murry for approximately one and one-half hours, eventually setting the family members' bodies on fire. The evidence produced at trial demonstrated the defendant had formed the intent and premeditation to kill Ms. Murry, spurned and fueled by jealousy, a violation of trust, and a lack

of control over his failed marriage. There was sufficient evidence from which the jury could find the defendant guilty of attempted first-degree murder.

B. SUFFICIENT EVIDENCE EXISTED FROM WHICH THE JURY COULD FIND MURRY GUILTY OF THE THREE AGGRAVATED FIRST-DEGREE MURDERS AND FIRST-DEGREE ARSON.

The defendant further alleges that there was insufficient evidence from which the jury could find him guilty of the first-degree murder charges and the first-degree arson, essentially arguing there was insufficient evidence of the perpetrator's identity. Br. at 17-21.

In *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974), the Supreme Court held that the State has the burden of proving identity through relevant evidence. "Any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment" may be used to prove identity. *Id*. at 560 (citations omitted).

Here, there is both direct and compelling circumstantial evidence the defendant committed the charged crimes. The defendant routinely remarked to his friends that Ms. Murry's family had too much influence over her, the family was constantly causing "issues" in his marriage, the family was trying to force Ms. Murry to choose between her family and the defendant, Ms. Murry's family was trying to change him, and the family

was trying to "poison" Ms. Murry against him. These remarks are all relevant to the defendant's intent and premeditation to kill the family members.

Sufficient evidence supports the jury's verdict that the defendant formed premeditated intent to kill the Canfields and Mr. Constable. The defendant had extensive tactical knowledge of weapons and how to force entry into a building and clear it. The defendant carefully planned the attack, armed himself, prepared a means of escape through the rural countryside, forcefully entered the Canfield's home in the dark of night, at a time when it could be expected the family was asleep and unable to defend themselves, and forced entry into their home; he then fired numerous kill shots into each family member. It can be reasonably inferred that all three family members were killed initially, as there was no evidence the family members attempted an escape or made a call for help. Multiple gunshots can support a finding of premeditation. *State v. Barajas*, 143 Wn. App. 24, 36, 177 P.3d 106 (2007). Moreover, the defendant burned all three victims after killing them. It can be reasonably inferred that the defendant's purposeful decision to burn the bodies (after shooting them multiple times) was preplanned and was payback for the harm the defendant believed the family had wreaked on his unsuccessful marriage.

A jury could also reasonably infer the AccuDure lubricant evidence

directly placed Mr. Murry at the crime scene. The jury could reasonably infer AccuDure was a unique substance, not yet available to anyone other than the defendant and the WSU scientist; that unique substance was found on three fired .22 caliber cartridges at the crime scene. At the time of the murders, the defendant had his vial of AccuDure in his car. Of the two individuals on earth who possessed this unique material, the defendant was the only person who also had motive, intent, and opportunity to commit the crimes. Accordingly, there was overwhelming evidence of premeditation and intent to kill the family members, and strong evidence that it was the defendant who committed the murders. There was more than sufficient evidence that the defendant committed three premeditated murders.

Sufficiency regarding the first-degree arson.

RCW 9A.48.020(1)(b) defines arson in the first-degree, in pertinent part, as follows: "(1) A person is guilty of arson in the first-degree if he knowingly and maliciously: …(b) Causes a fire or explosion which damages a dwelling." *See also* CP 1, 1196; RP 3139, 4138.

In addition to the defendant's research on the internet the night before the arsons regarding combustible materials, methods for starting fires, and his search for the songs "Gasolina," and "Burn it down," the arson investigator's uncontroverted testimony was that the residence was purposefully set on fire. The investigator relied on the presence and

placement of gasoline in the home, along with evidence of gasoline pour patterns from Ms. Canfield's body to Mr. Constable's body in the dining room/kitchen area. Finally, as discussed above, AccuDure found on the fired casings placed the defendant at the scene, and as the one who purposefully started the home, shed, and bodies on fire. There was more than sufficient evidence from which the jury could find the defendant committed first-degree arson.

C. COUNT FOUR OF THE INFORMATION, ATTEMPTED FIRST-DEGREE MURDER, WAS NOT DEFECTIVE.

The defendant alleges that count 4 of the information was defective as it did not include "premeditation" as an essential element of attempted first-degree murder. Br. at 15-16. This Court reviews a purportedly deficient charging document de novo. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016). An information is constitutionally defective if it fails to list the essential elements of a crime. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The essential elements rule provides that an information must allege sufficient facts to support each element of the crime charged. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 108, 812 P.2d 86 (1991). In a challenge to the sufficiency of an information, a reviewing court must first decide whether the allegedly missing element is, in fact, an essential element. *See State v. Tinker*, 155 Wn.2d 219, 220, 118 P.3d 885 (2005). If so, and where

the defendant challenges, as here, the sufficiency of the information for the first time on appeal, the court must then "liberally construe the language of the charging document in favor of validity." *Zillyette*, 178 Wn.2d at 161.

Liberal construction requires that the court determine whether the information contains, in some form, language that can be construed as giving notice of the essential elements.[17] *State v. Moavenzadeh*, 135 Wn.2d 359, 362-63, 956 P.2d 1097 (1998). The reviewing court is not required to examine each count in isolation. *State v. Laramie*, 141 Wn. App. 332, 339, 169 P.3d 859 (2007). A court should be guided by common sense and practicality in construing the language. *State v. Nonog*, 169 Wn.2d 220, 230-31, 237 P.3d 250 (2010). "Even missing elements may be implied if the language supports such a result." *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). A liberal standard of review is used to discourage "sandbagging" – where the defendant recognizes a defect in the information but declines to raise it before trial when a successful objection would result in the court allowing the State to amend the information. *Kjorsvik*, 117 Wn.2d at 97. If the information contains language that can be considered as giving notice, the court then considers whether the defendant was

[17] If the information cannot be construed as giving notice of the essential elements, "the most liberal reading cannot cure it." *State v. Campbell*, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995).

"nonetheless actually prejudiced by the inartful language which caused a lack of notice." *State v. Williams*, 162 Wn.2d 177, 185, 170 P.3d 30 (2007).

Assuming "premeditation" is an essential element of attempted first-degree murder, the information here was sufficient. Counts one, two, and three alleged first-degree premeditated murder and each separate count alleged that the defendant, *with premeditated intent*, caused the death of three separate family members on the same day. Attach. A (CP 1-2, Information). All the essential elements of premediated first-degree murder were present in the information. Counts one, two and three provided ample notice to the defendant (over the approximate one and one-half years he had to prepare to defend against the charge) that the State would attempt to prove that he took a substantial step toward the premeditated first-degree murder of his wife, which was part of the same course of conduct occurring at the same time, day, and place as counts one, two, and three. Therefore, the information provided notice that attempted first-degree murder required premeditation. As to the prejudice prong of the test, the defendant does not and cannot claim prejudice.

The Supreme Court addressed a similar situation in *Nonog*. In that case, the defendant alleged for the first time on appeal that the information was defective because it did not allege all of the elements of interfering with domestic violence reporting. 169 Wn.2d at 224. The defendant argued that

count four of the information did not specify the underlying crime that the victim attempted to report. *Id.*

In assuming – without deciding – that the information in that case needed to reasonably apprise the defendant of the underlying domestic violence crime, our high court held that the information met that standard:

> From [count 4], Nonog had clear notice that he was accused of committing a crime of domestic violence on March 30, 2006. Furthermore, count IV stated that the crime was "of the same or similar character and based on the same conduct as another crime charged" in the information. Reviewing the information as a whole, one can reasonably discover that Nonog was charged with two other crimes occurring on March 30, 2006, each of which had the term "domestic violence" in the boldface title of the offense. Under *Kjorsvik*'s liberal construction test, the information reasonably apprised Nonog of the domestic violence crimes underlying the interfering with reporting charge in count IV.

Nonog, 169 Wn.2d at 229 (citations to the record omitted).

The same reasoning is applicable here. The defendant had sufficient notice of premeditation as it applied to count 4, and has not argued or established prejudice.

If this Court determines the information was insufficient regarding "premeditation" under Count 4, it can "reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." [18] RAP 12.2. If this Court finds the

[18] In the event this Court reverses the attempted first-degree murder conviction, an alternative remedy is to dismiss without prejudice and allow the State to elect to recharge the defendant with an amended information and retry him on attempted first-degree

information insufficient to charge attempted premediated first-degree murder, the State is requesting this Court remand for entry of a judgment on the lesser degree crime of attempted second-degree murder.

The defendant's real complaint is that the information did not include "premeditation" as an element in count 4, and the State *only* charged an attempted second-degree murder. A person commits attempted second-degree murder if, with intent to commit murder, "he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1); *see also* WPIC 100.01; CP 1-2 (information). A person commits second-degree murder "when with intent to cause the death of another person but without premeditation, he or she causes the death of such person." RCW 9A.32.050(a); *see also* WPIC 27.01.

Count 4, at a minimum, charged attempted second-degree murder. The jury was necessarily instructed on and found the elements of the inferior crime of attempted second-degree murder (attempted intentional killing) were proved beyond a reasonable doubt, when it found the defendant guilty of the greater offense of attempted first-degree murder.[19] Moreover, the

murder. *See State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010); *City of Auburn v. Brooke*, 119 Wn.2d 623, 639, 836 P.2d 212 (1992).

[19] The jury was instructed on attempted first-degree murder (WPIC 100.01, 100.02), on "substantial step" (WPIC 100.05), on completed first-degree murder (WPIC 26.01), on "premeditation" (WPIC 26.01.01), and on "intent" (WPIC 10.01). CP 199-204.

defendant was on notice that he could be convicted of an inferior degree crime. *See* RCW 10.61.003; *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979). His trial strategy that he was not the person responsible for the charged crimes would be no different when defending against either attempted first-degree murder or attempted second-degree murder. He cannot establish any harm or resulting prejudice.

Therefore, the instant case satisfies both the majority and minority analyses set forth in *In re Heidari*, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012). Count 4 of the information clearly charged and gave notice, at a minimum, that the defendant attempted to intentionally kill Ms. Murry. The jury necessarily found the elements of attempted second-degree murder when it found the defendant guilty of attempted first-degree murder. "Intent to kill" was satisfied by the trial court's instructions number 8 (definition of first-degree murder – including "intent to kill"), number 12 (definition of "premeditation" requires a defendant to "form an intent to take human life"), number 13 ("intent" defined), number 14 (definition of attempted first-degree murder), and number 15 ("to convict" instruction for attempted first-degree murder). *See* CP 1185-92.

Therefore, if this Court determines the information was inadequate regarding "premeditation" for attempted first-degree murder, the State requests this Court remand that count with instructions for the trial court to

enter a judgment of attempted second-degree murder. *See generally In re Heidari*, 174 Wn.2d 288.

D. THE DEFENDANT FAILED TO OBJECT TO THE SCOPE OF THE GUN OWNERSHIP EVIDENCE, WAIVING THE ISSUE. MOREOVER, THE EVIDENCE WAS PROBATIVE. IF IT WAS ERROR TO ADMIT THIS EVIDENCE, IT WAS HARMLESS.

The defendant next argues that evidence that he owned or possessed many firearms and ammunition, by itself, imputed bad character.

Standard of review.

A trial court's ruling on the admission of evidence is reviewed for a manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984); *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). The trial court is in the best position to evaluate the dynamics of a jury trial and the prejudicial effect of a piece of evidence. *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962). Accordingly, any error in admitting evidence is grounds for reversal only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961, 965 (1981).

Evidence is relevant if it has a tendency to make the existence of any fact consequential to the resolution of an action more or less probable than it would be without that evidence. ER 401. Relevant evidence

encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. *Rice*, 48 Wn. App. at 13. Facts tending to establish a party's theory of the case will generally be found relevant. *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986), *overruled on other grounds*, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."[20] ER 403. Yet, "nearly all evidence will prejudice one side or the other," and "[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial." *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). "[W]here the evidence is undeniably probative of a central issue," the danger that unfair prejudice will outweigh the evidence's probative value is "quite slim." *Id.* at 224.

In the present case, the defendant moved in limine to exclude evidence that he had a "gun collection." RP 245-46. The court allowed the testimony to show that the guns were not used to commit these offenses, and also to show the defendant's familiarity with firearms; the State was not allowed to introduce this evidence to support a claim that because he had a

[20] "Almost all evidence is prejudicial as it is used to convince the trier of fact to reach one decision rather than another. However, 'unfair prejudice' is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *Rice*, 48 Wn. App. at 13 (citations omitted).

gun collection, he must have committed the offenses. RP 258. Contrary to the defendant's assertion, the court's ruling did not limit the introduction of this evidence to only those firearms tested and analyzed by the state crime lab.

Moreover, defense counsel never voiced an objection to the introduction of the firearms evidence at trial. Accordingly, the issue has not been preserved for appeal. Generally, when no objection is made to the evidence *at trial*, an evidentiary error is unpreserved. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Where, as here, evidentiary rulings are made pursuant to motions in limine, the losing party is deemed to have a standing objection to a final ruling, "[u]nless the trial court indicates that further objections at trial are required when making its ruling."[21] *Powell*, 126 Wn.2d at 256-57.

"[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling." *Id.* at 257; *see also State v. Weber*, 159 Wn.2d 252, 272, 149 P.3d 646 (2006) (unless "an unusual circumstance

[21] In *Powell*, the Court explained: "If the trial court has made a…final ruling, on the record, the parties should be entitled to rely on that ruling without objecting again at trial. When the court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties must raise the issue at the appropriate time with proper objections at trial." 126 Wn.2d at 256.

exists that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible" the failure to object at trial waives the objection). This rule gives the court the opportunity to determine whether the evidence is covered by the pretrial motion and, if so, whether the court can cure any potential prejudice through an instruction. 159 Wn.2d at 272.

Here, the court had ruled pretrial that evidence of the defendant's firearms possession was admissible if used by the State to establish the defendant's familiarity with firearms; by failing to object to the scope of the evidence as he does now, the defendant deprived the court of the opportunity to limit, if necessary, such evidence. The defendant has waived any alleged error by failing to object at trial. *See* RAP 2.5.

Furthermore, other than baldly claiming this evidence was prejudicial, the defendant offers no authority that gun ownership implicates a character trait and is governed by ER 403(a) and ER 404(b). He offers no explanation how this evidence improperly placed his character into evidence. He provides no authority that disallows this type of evidence when it is relevant to a central issue in the trial. Further, it is not uncommon, especially in Eastern Washington, for hunters, farmers, and enthusiasts to own many different firearms. Gun ownership is lawful and often considered desirable. *See Staples v. United States*, 511 U.S. 600, 610, 114 S.Ct. 1793,

1799, 128 L.Ed.2d 608 (1994) ("there is a long tradition of widespread lawful gun ownership by private individuals in this country").

It appears Mr. Murry's real objection is to the relevancy of the evidence. Evidence of the defendant's various guns was relevant to establish the defendant's expertise with firearms, whether he had the means to commit the murders, and law enforcement's efforts to locate the missing .22 caliber murder weapon.[22] It was also probative to defendant's planning and premeditation, as it demonstrated he had to choose which gun could be easily concealed and remain operable during the murders, which gun would create the least amount of noise, which gun could be easily reloaded, and which caliber gun (and ammunition) could be used to kill his victims.

Nothing in the record supports the proposition that the State used the evidence improperly. The State never argued or alleged that because the defendant had a collection of guns and ammunition that the jury should infer anything negative from it.[23] The prosecutor's closing argument demonstrates that the State used this evidence to establish Mr. Murry's proficiency with firearms and his tactical thinking. RP 4156-57.

In *Callahan v. State*, 527 N.E.2d 1133, 1137 (Ind. 1988), the

[22] It also corroborated witness testimony that the defendant owned several .22 caliber pistols, one of which could have been used during the homicides.

[23] For that matter, the State presented evidence that the *victims* possessed multiple firearms.

defendant was convicted of murder; he argued on appeal that the court impermissibly allowed the State to inquire about his family's gun collection and "survivalist" beliefs. The Indiana Supreme Court disagreed, stating: "the testimony about the gun collection and appellant's marksmanship could tend to prove the accessibility of guns to him and his skill in their use." *Id.* at 1137. Accordingly, even if this issue was preserved, the trial court did not abuse its discretion when it allowed the evidence.

The defendant's reliance on *State v. Rupe*, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984), is unavailing. In *Rupe*, a defendant was convicted of multiple counts of aggravated first-degree murder and first-degree robbery while armed with a firearm. The State sought the death penalty. At sentencing, the State introduced evidence of the defendant's gun collection, which had not been used in the guilt phase of the trial. The Supreme Court held that the admission of this evidence was error because there was "no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence." *Id.* at 708. The sole purpose of the evidence *in that case* was an impermissible one, to portray the defendant as a dangerous individual. *Id.* Such is not the case here.

Finally, even if this Court determines the trial court abused its discretion by admitting the evidence, a new trial is not required unless the testimony so tainted the proceedings that it was impossible for the defendant

to have a fair trial. *See Tharp*, 96 Wn.2d at 599. This Court examines the prejudicial effect of the improper testimony in the context of all the arguments and evidence presented at trial. *Id.* Improper testimony does not deny a defendant a fair trial unless there is a substantial likelihood that the trial irregularity could have influenced the jury or affected its verdict. *State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984). Here, the defendant fails to demonstrate how the evidence impacted the jury's verdict. Even if the evidence was admitted in error, there was substantial other evidence upon which the jury could convict the defendant.

E. THE COMPLAINT REGARDING THE "PREPPER" TESTIMONY WAS NOT PRESERVED. THE EVIDENCE WAS PROBATIVE TO MR. MURRY'S SKILL TO PLAN AND EXECUTE THE CRIMES. FINALLY, ANY ERROR WAS HARMLESS.

The defendant next argues that, what he terms "survivalist" testimony, was prejudicial. Br. at 28-30. At trial, witnesses were questioned regarding the term "prepper," and its applicability to the defendant. *See, e.g.*, RP 2836-37. In that context, no witness was ever questioned and no argument was made by the State regarding the term "survivalist." In fact, the prosecutor emphatically told the jury not to convict the defendant based upon the "prepper" testimony as discussed below.

As with the gun ownership evidence, the defendant offers no authority that the term "prepper" is inherently prejudicial. A "survivalist"

"…makes preparations to survive a widespread catastrophe, as an atomic war or anarchy, especially by storing food and weapons in a safe place."[24] Similarly, a "prepper" "…believes a catastrophic disaster…is likely to occur…and makes active preparations for it, typically by stockpiling food, ammunition, and other supplies."[25] Neither term is inherently negative.

Here, the defendant failed to object to this evidence at trial. The failure to object to the admission of evidence waives the issue on appeal. *Guloy*, 104 Wn.2d at 421. He also fails to establish his claim is of constitutional magnitude that can be raised for the first time on appeal. Accordingly, he has waived this evidentiary objection. *See* RAP 2.5.

Moreover, the "prepper" evidence was probative in that it could have aided the jury in determining whether the defendant had the necessary skill and adeptness to plan and commit the charged crimes. "Motive and prior conduct of [the] defendant is ... part of the substantive evidence to show premeditation." *State v. Ross*, 56 Wn.2d 344, 349, 353 P.2d 885 (1960). The record is replete with references to the defendant's military career, survival techniques he learned in the military, and his proficiency with firearms and their tactical use. In that regard, the prosecutor never argued that because the defendant was perceived as a "prepper," he was

[24] https://www.dictionary.com/browse/survivalist (last visited on Feb. 1, 2019).

[25] https://en.oxforddictionaries.com/definition/prepper (last visited on Feb. 1, 2019).

more likely to commit the murders. *See* RP 4160 ("The State is not asking you to convict Mr. Murry because he was a prepper. But a lot of this stuff shows what he thought, how he thought"). This evidence put into perspective the defendant's military background, training, and thought processes before and during the murders and arson, all concepts relevant to the charges.

Finally, if there was error, the defendant has not established that admission of the evidence deprived him of a fair trial. There was substantial other evidence upon which the jury relied on to convict the defendant.

F. THE "CONSPIRACY THEORIST" CLAIM IS UNPRESERVED. THE EVIDENCE WAS PROBATIVE TO ESTABLISH MOTIVE AND PREMEDITATION. ANY ERROR WAS HARMLESS.

The defendant next argues that evidence concerning his belief in "conspiracy theories" was error, but does not explain how it was prejudicial. Br. at 30-32. Because he did not object to the evidence at trial and it is a non-constitutional claim, the claim is waived and this Court should decline to review it for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-97, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). If this Court reaches the merits of this claim, as with other arguments above, the defendant has provided no authority that evidence related to an individual's belief in "conspiracy theories" is innately prejudicial.

A "conspiracy theory" is "a theory that explains…a set of

circumstances as the result of a secret plot by…powerful conspirators."[26] Here, the evidence was introduced to show a motive and the premeditation necessary for the attempted murder of Ms. Murry and murder of Ms. Canfield. Indeed, the defendant told a friend, after the murders, that his wife was the enemy in their separation and "the Russians knew something about it." RP 2310. The defendant also remarked to Ms. Murry, before the murders, that he had been doing work for the "Russians" and the CIA. RP 2766. Yet, many of the witnesses could not recall specific details regarding the defendant's ideas regarding the "Russians." *See* RP 2310, 2345, 2765, 2767, 2860, 2891-92, 2887, 2989, 3129, 3153, 3293-94, 3868.

The State elicited this testimony to suggest a contributing motive and intent for one or more of the murders and the attempted murder – that Ms. Canfield and Ms. Murry breached the defendant's trust, as he claimed both were Russian operatives working for that government's secret police, that they had turned him into the Russian police, and, as result, the Russian police were after him; thus, he harbored animosity toward them for their believed actions. *See* RP 3153, 3293-94, 3868. In that regard, after the murders, the defendant referred to Ms. Murry as the enemy. RP 2310.

Finally, if there was error, the defendant has not demonstrated how

[26] https://www.merriam-webster.com/dictionary/conspiracy%20theory (last viewed Feb. 1, 2019).

he was prejudiced. There was substantial other evidence in the record upon which the jury could have convicted the defendant of the charged crimes.

G. THE COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN IT ADMITTED HIGHLY PROBATIVE EVIDENCE OF THE SONG TITLES MR. MURRY POSTED ON FACEBOOK.

The defendant claims he was prejudiced by the erroneous admission of several song titles at trial. However, he admits that, standing alone, the admission of this evidence would not warrant reversal. Br. at 38-39.

During the investigation, Detective Kirk Keyser reviewed the defendant's Facebook and Twitter accounts and his computer activity immediately preceding the crimes. The defendant posted three song titles, and linked their music videos to his Facebook account at roughly 7:43 a.m., on May 25, 2015, the day preceding the murders and arson. RP 3239. It was determined that gasoline was used during the arson.

Prior to trial, the State moved in limine for the admission of these song titles, "Gasolina," "Face Everything and Rise," "Burn It Down," and "Revolution," searched for in conjunction with the defendant's contemporaneous internet searches for fire starting material and components. RP 223-25. The defense did not argue that the proposed evidence was prejudicial, but rather argued that the evidence should not be

admitted based upon a lack of authentication.[27] RP 228-34. However, the court ruled that the song titles and their lyrics had at least a minimal logical relevance because they dealt with fire and "other things that might be associated with the crime." RP 240. The trial court also ruled that by posting the songs, Mr. Murry adopted their messages, and the question of whether he posted the songs, bore only on the weight to be given to the evidence. RP 243. The defense independently requested that the videos or lyrics affiliated with the song titles be played for the jury, which was granted by the court. RP 244.

Standard of review.

The trial court has considerable discretion to consider what evidence is relevant and to balance its possible prejudicial impact against its probative value. *See State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

Here, for the first time on appeal, the defendant argues admission of the song titles was prejudicial. On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *O'Hara*, 167 Wn.2d at 97-97. Accordingly, the defendant lost his opportunity for review of the songs' potential prejudice.

Additionally, an appellate court will not reverse a trial court's

[27] The defense summarily argued in their pretrial briefing that admission of the song titles would be prejudicial but did not raise that argument at the time of hearing. *See* CP 374-75.

decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based a different rule.[28] *State v. Powell*, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009) (plurality opinion); *State v. Kilponen*, 47 Wn. App. 912, 918, 737 P.2d 1024 (1987), *review denied*, 109 Wn.2d 1019 (1987). Accordingly, error may be assigned only on the same basis asserted at trial. *Guloy*, 104 Wn.2d at 422; RAP 2.5 (a).

If this Court considers the issue, Mr. Murry cannot establish the court manifestly abused its discretion by allowing the evidence. The State had the burden to establish premeditation, knowledge, identity,[29] and the intent of the defendant, who started the two fires on May 26, 2015, and who committed the murders. Less than a day before the murders and arson, the defendant researched and posted the song titles "Gasolina," "Burn it down," "Face Everything and Rise," and "Revolution."[30] The gasoline-fueled arson was equivalent to "burning the Canfield residence down."

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[28] "Error may not be predicated upon a ruling which admits or excludes evidence unless ... a timely objection…is made, stating the specific ground of objection." ER 103(a)(1).

[29] "[A]ny relevant fact, either direct or circumstantial, which would convince [the fact-finder] of the identity of a person should be received and evaluated." *Hill*, 83 Wn.2d at 560. Circumstantial evidence often may be more probative than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975).

[30] Several other internet searches were made by the defendant during this same time frame, which were admitted at trial without objection, "Terminator 4," "Hitman Absolution," a video game – "Agent 47 Hitman Absolution," "Hitman Absolution Sniper Challenge" and a YouTube trailer for "Hitman Absolution; Nuns, Guns, and Agents 47 E3." RP 3240-41.

If not directly, at least circumstantially, a jury could infer the defendant's intent, preparation and knowledge from his specific internet song searches made within hours of the crimes. This evidence becomes even more material when paired with the defendant's other, contemporaneous internet searches regarding methods for starting fires. *See Commonwealth v. Carey,* 463 Mass. 378, 389, 974 N.E.2d 624 (2012) (internet searches related to strangulation were probative of the defendant's state of mind); *Com. v. Vera*, 88 Mass. App. Ct. 313, 319, 36 N.E.3d 1272, 1277, *review denied,* 473 Mass. 1105, 41 N.E.3d 1092 (2015) (internet searches for child pornography was highly probative of the defendant's intent and the lack of innocent mistake in an exposure case involving a young girl).

In *State v. Langlois*, 2 N.E.3d 936 (2013), *review denied*, 138 Ohio. St. 3d 1451 (2014), the defendant was convicted of aggravated first-degree murder. At trial, evidence was introduced, without objection, that he searched for websites pertaining to firearms, gun parts, replacement barrels, and pistol silencers regarding his Glock pistol. *Id.* at 942. He argued on appeal that the admission of his internet browsing history was irrelevant. The Ohio court disagreed, holding that his internet browsing history was obviously relevant to the method of the murder given the particular topics he researched, and its introduction at trial was not plain error. *Id.* at 958; *see also People v. Zirko*, 976 N.E.2d 361 (Ill. App. Ct. 2012), *review denied*,

981 N.E.2d 1003 (2012) (in murder and solicitation case, the defendant's internet searches for a hitman and a mercenary were relevant to prove both motive and intent to commit the murders and the solicitation to commit murder).

Here, the court acted within its discretion when admitting the song titles searched for and posted by Mr. Murry describing his actions – the arson and murders. The songs were relevant to establish contested issues including intent, premeditation, and preparation for the charged crimes. Furthermore, the song titles were strong corroboration of the defendant's knowledge of the accelerant (gasoline) used in the arson and corroborated his post-crime statement at the "vape" shop, only 12 hours after the arsons, claiming to know someone who started some fires.

State v. DeLeon, 185 Wn.2d 478, 481-82, 489, 374 P.3d 95 (2016), is not helpful to defendant's claim. There, the State presented music lyrics of a popular Latin band stored in the defendant's cell phone as evidence of the defendant's gang involvement to help establish three counts of first-degree assault with a firearm. The Court noted there was no support in the record that a person's enjoyment of particular music was evidence of gang involvement. Trial courts were cautioned to "exercise…caution when drawing conclusions from a defendant's musical preferences." *Id*. at 489.

Here, in contrast, there was sufficient evidence in the record to

support the State's theory and use of the music titles at the time of trial. The trial court did not manifestly abuse its discretion. Even if it was error to introduce this evidence, it was harmless in that there was substantial other evidence upon which to convict the defendant. Accordingly, the argument has no merit.

H. THE DEFENDANT'S SOCIAL MEDIA MONIKERS WERE RELEVANT TO ESTABLISH THE NAMES USED BY MR. MURRY ON SOCIAL MEDIA WHEN DATING MS. MURRY.

For the first time on appeal, the defendant alleges that inclusion of his social media monikers at trial was prejudicial. Br. at 39.

At the time of trial, Ms. Murry testified regarding her communication with the defendant on his Facebook account. RP 2695-97. The testimony was introduced to establish how the defendant and Ms. Murry met and how the couple communicated. RP 2695. The defendant initially used the profile "Michael Collins" on Facebook, because of the name's historical significance. RP 2696. On Facebook, Ms. Murry also knew the defendant by the names of "Sean Archer" and "Henry." RP 2697. The defendant did not object to this testimony.

As above, the defendant has not provided any authority that the use of an alternative name on social media is prejudicial. He also did not object below; this claim is waived. RAP 2.5(a); *O'Hara*, 167 Wn.2d at 97-98.

Additionally, the defendant's monikers were known to Ms. Murry

as used by the defendant while the couple dated. In *State v. Elmore*, 139 Wn.2d 250, 283-84, 985 P.2d 289 (1999), the Supreme Court upheld the use of an "alias" during trial when it was shown that the alias was the name some of the witnesses knew Elmore by. In this case, the defendant's use of other names was plainly explained. It is not uncommon for individuals to use a different name on social media to protect one's privacy or identity. Furthermore, Ms. Murry knew the defendant by those names. As such, this claim was waived and, if considered by this Court, it has no merit. Finally, if it was error, it was harmless.

I. THERE WAS NO MARITAL PRIVILEGE VIOLATION AS THE DEFENDANT FAILED TO ASSERT THE PRIVILEGE AND THE TESTIMONY DID NOT FALL UNDER THE PRIVILEGE.

The defendant further alleges the statutory husband/wife/domestic partner privilege, RCW 5.60.060(1), was violated by Ms. Murry's testimony at trial. Br. at 39-47. During trial, the defense objected to text messages written by and exchanged between Mr. and Ms. Murry during their marriage and prior to the offenses on the basis they were not relevant. RP 2490-91. At no time did the defendant assert the marital privilege.

Under the rules of witness competency, RCW 5.60.060(1) addresses married persons and registered domestic partners who are disqualified from giving testimony and those to whom privileged communications apply. However, the privilege may be waived and applies only if timely asserted.

State v. Clark, 26 Wn.2d 160, 168-69, 173 P.2d 189 (1946), *overruled, in part, on other grounds by State v. Burden*, 120 Wn.2d 371, 841 P.2d 758 (1992). Here, the defendant did not assert the privilege at trial and, thus, he has waived any claim on appeal that the privilege was violated.

Further, this privilege does not apply in a prosecution for a crime committed by one spouse against the other, RCW 5.60.060(1); *State v. Thornton*, 119 Wn.2d 578, 835 P.2d 216 (1992), for an attempted crime of personal violence, *see Kilponen*, 47 Wn. App. at 916, or if the crime of violence is against a spouse and another person. *State v. Thompson*, 88 Wn.2d 518, 522, 564 P.2d 315 (1977), *overruled on other grounds Thorton*, 119 Wn.2d at 580. Thus, here, even if not waived, any marital privilege does not apply given the charges.

J. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED THE DEFENDANT OPENED THE DOOR TO TESTIMONY ABOUT HIS "LIST"; THIS EVIDENCE ESTABLISHED A CONTRIBUTING MOTIVE TO COMMIT THE CRIMES.

During trial, the State argued that Ms. Murry was fearful of telling the defendant she wanted a divorce because he had, what was referred to in the vernacular as, a "shit list"; he would kill any person who "crossed" him, and Ms. Murry was fearful of being added to the "list." RP 2763. Initially, the defense objected to this proposed testimony arguing it was prejudicial. RP 2675-76. The trial court initially ruled that evidence regarding the list

would be too prejudicial, albeit relevant. RP 2730-31. However, during Ms. Murry's cross-examination by the defense, Ms. Murry was asked whether the defendant ever verbally threatened her to stay in the marriage. RP 2865. Based upon this questioning, the State argued the defense had opened the door to the "list." RP 2872-75. Ultimately, the trial court allowed Ms. Murry to testify about the "list" to clarify her cross-examination testimony – that the defendant never "directly" threatened her, and to prove an element of the offense – premeditation. RP 2879-81. The court stated it would entertain a limiting instruction, but the defense did not request one be given. RP 2781.

Ultimately, Ms. Murry testified:

> He just -- throughout our relationship he had like a shit list, just a -- a list of people who had betrayed him that had -- did the opportunity arise, he would kill them. And that was a continuous theme that -- I mean, it wasn't just a one time. He mentioned it just throughout our whole relationship. When something would happen, he would say something about it.

RP 2893.

1. <u>The defense opened the door to the evidence.</u>

On cross-examination, the defense asked Ms. Murry whether the defendant ever verbally threatened her about a divorce, and other questions designed to show the defendant appeared amenable to a divorce. *See* RP 2864-70. A party who introduces evidence on a subject may open the door to otherwise inadmissible testimony offered to explain, clarify, or contradict

that evidence. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *State v. Olsen*, 187 Wn. App. 149, 158, 348 P.3d 816 (2015). The list became relevant to rebut the defense's assertion on cross-examination that the defendant did not threaten Ms. Murry to prevent her from seeking a divorce. *See* RP 4213-15 (defendant's closing argument).

2. Ms. Murry's state of mind was immaterial to whether to admit the evidence at trial.

To be admissible, evidence of the victim's state of mind must be relevant to a material issue of fact. *State v. Cameron*, 100 Wn.2d 520, 531, 674 P.2d 650 (1983). Notwithstanding that the defendant opened the door to the testimony, Ms. Murry's state of mind was immaterial as to whether the defendant's list, which pertained to the *defendant's statements*, was admissible at trial. Accordingly, the defendant's reliance on *State v. Parr*, 93 Wn.2d 95, 98-104, 606 P.2d 263 (1980), is misplaced. Unlike in *Parr*, here, the State did not move to introduce the testimony through a hearsay exception; rather, the State moved for admission of statements made by the defendant, as a party opponent,[31] made during the marriage, to establish the defendant inferentially threatened Ms. Murry not to seek a divorce. In addition, Ms. Murry was present in court and subject to full cross-examination. Finally, Ms. Murry's belief that she had been threatened was

[31] Party-opponent admissions are excluded from the definition of "hearsay." ER 801(d)(2).

necessary to rebut the defendant's assertion that she had never been threatened.

Likewise, the testimony regarding the "list" was relevant to the issue of motive and premeditation. The defendant held trust and loyalty in a high regard, requiring both from Ms. Murry. The defendant was reticent about obtaining a divorce, became increasingly more volatile, and blamed Ms. Murry and her family for the couple's problems. The evidence was relevant to establish the defendant's belief that Ms. Murry and her family had "betrayed him." The list also tied the defendant to the murders as it provided an explanation into the personal and very violent murders of the Canfields – that there were consequences for aggrieving the defendant. Accordingly, the trial court did not manifestly abuse its discretion when it determined the defense had opened the door to the testimony and the evidence was relevant and admissible under ER 801(d)(2).

K. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS BECAUSE MR. MURRY DOES NOT PROVIDE ANY EVIDENCE UNDERCUTTING HIS COMPETENCY TO STAND TRIAL.

The defendant claims he was denied effective assistance of counsel, alleging his trial counsel did not raise the issue of his competency prior to or at trial. Br. at 49-53. The Sixth Amendment guarantees reasonable competence of counsel, not perfection; counsel can make demonstrable

mistakes without being ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Scrutiny of defense counsel's performance is highly deferential and it employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). However, "[w]hen…counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency…so long as such incapacity continues." *In re Fleming*, 142 Wn.2d 853, 687, 16 P.3d 610 (2001). To establish prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different absent counsel's deficiency. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong defeats an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 697.

RCW 10.77.050 provides that no incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such

incapacity continues. The two-part test for legal competency for a criminal defendant is: "(1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense." *In re Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001); *see* RCW 10.77.010.

In *In re Fleming*, a personal restraint petition not limited to the record, the Supreme Court held that defense counsel was ineffective because counsel knew of psychological evaluations concluding that Fleming was incompetent, but did not raise the issue of competency before the defendant entered a guilty plea. 142 Wn.2d. at 858-59. The Court found that defense counsel's representation fell below an objective standard of reasonableness because the evaluations provided an abundance of reason to suggest that Fleming was incompetent. *Id.* at 866-67. For example, one report concluded that Fleming was psychotic at the time of the crime and "marginally competent" to stand trial, and another concluded that Fleming was "incompetent" to stand trial. *Id.* at 858. The court held that, had the trial court been informed of these conclusions, the outcome, which was the acceptance of the plea, would likely have been different. *Id.* at 867.

Here, Mr. Murry cites examples from the record that he contends should have suggested that he was incompetent, including: appearing dejected, losing weight, donning a different haircut, behavioral changes, odd conversations about the Russians and Central Intelligence Unit,

discussing aliens, believing Ms. Murry was a spy, claiming to be a "shape shifter," claiming to be in the witness protection program, his habit of sweeping houses, and that he valued loyalty and trust in only a small group of people. However, other than his bare allegations, the defendant fails to establish he could not either understand the nature of the proceedings or participate in his defense. Contrarily, his behavior could be explained by the travails of marital discord, being charged with five most serious offenses, being unemployed, or by his unconventional belief system. Despite his unorthodox ideology, however, there is no information that the defendant could not adequately interact with defense counsel, that this ideology interfered with the lawyer-client relationship, that the defendant did not possess a sufficient understanding of the proceedings or that he was unable to relate relevant facts to his counsel. The record is devoid of erratic behavior or outbursts, communication difficulties or other objective evidence that he was incompetent. The record is also silent as to whether counsel had the defendant's competence independently evaluated, and, if so, the expert's conclusions. He was represented by two experienced lawyers.[32] The law presumes that his attorneys competently performed their

[32]Kryzminski has practiced law since 1990 and Gannon-Nagle has practiced since 2007. https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000019576 (last visited Jan. 31, 2019); https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000039311 (last visited Jan. 31, 2019).

duties. Neither counsel observed anything (in the one and one-half years they represented him) that would lead them to believe the defendant was not competent. He fails to demonstrate either deficiency or prejudice.

L. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED THE ELECTRON TRANSMISSION MICROSCOPE WAS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY AND PRODUCED SCIENTIFICALLY RELIABLE RESULTS.

The defendant assigns error to the trial court's conclusions E., J., and K., regarding the admissibility of evidence concerning the transmission electron microscope used by MVA Industries to compare the nanoparticles of various pieces of evidence. *See* CP 1142-51. No error has been assigned to the court's findings of fact. Therefore, they are verities on appeal. *State v. Scherf*, 192 Wn.2d 350, 371, 429 P.3d 776, 789 (2018).

Standard of review.

The admissibility of evidence under *Frye*[33] is a mixed question of law and fact that is reviewed de novo. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). Washington courts adhere to the *Frye* test in evaluating the admissibility of novel scientific evidence. *Id.* at 261. Under *Frye*, novel scientific evidence is admissible only where it is based on theory and methods that are generally accepted in the relevant scientific community. *State v. Ramirez*, 5 Wn. App.2d 118, 136, 425 P.3d 534 (2018).

[33] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The technique must be capable of producing reliable results. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

An appellate court does not determine whether the scientific theory is correct; its review is merely of whether the theory is generally accepted in the scientific community. *Id.* at 359-60. General acceptance may be found "from testimony that asserts it, from articles and publications, from widespread use…or from the holdings of other courts." *State v. Kunze*, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022 (2000). If there is a significant dispute between qualified experts as to the validity of scientific evidence, there is no general acceptance. *Copeland*, 130 Wn.2d at 255. "The trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both [the] *Frye* [standard] and ER 702."[34] *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). The *Frye* standard complements ER 702 by attempting to screen unreliable testimony from the jury because "[u]nreliable testimony does not assist the trier of fact." *Id.* at 918-19. An appellate court reviews admission of evidence under ER 702 for abuse of

[34] Under ER 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004).

1. Conclusion of law "E" (CP 1143).[35]

Under ER 702, expert testimony is generally admissible if (1) the expert is qualified; (2) the expert relies on generally accepted theories in the scientific community; and (3) the testimony would be helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 354, 333 P.3d 388 (2014). "Education and practical experience may qualify a witness as an expert." *State v. Jones*, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994). This conclusion is a correct statement.

2. Conclusion of law "J" (CP 1144).[36]

The defendant claims the TEM is not recognized in the "criminal forensic field" and, consequently, it is not accepted within the relevant scientific community. At the *Frye* hearing, Mr. Brown testified he is the executive director for MVA Scientific Consultants (MVA), an accredited laboratory.[37] RP 346. Mr. Brown had worked at MVA for approximately 25

[35] "Expert testimony is generally admissible if (1) the witness is qualified as an expert, (2) the expert relies on theories that are generally accepted in the scientific community, and (3) the testimony would be helpful to the trier of fact." CP 1143.

[36] "Any objection to the methodology as applied in a specific instance goes to the credibility and not to the admissibility of the experts' opinion." CP 1144.

[37] MVA is accredited "to ISO 17025" and "accredited by a group called A2LA." It is "DEA registered for schedule I through IV substances," "registered with the FDA, and the company complies "with Good Manufacturing Practices, CGMP." RP 347.

years, performing investigative analyses and identification on small particles from a variety of different fields, including medical devices, pharmaceutical products, and other industries. RP 346-47, 380-81. Mr. Brown had received instruction[38] in trace evidence, scanning electron microscopy, particulate analysis, polarized light microscopy, and 4A transform infrared light microscopy. RP 350-51. Mr. Brown had published articles in his field, some of which had been peer reviewed. RP 382.

The TEM was developed between the 1930s and 1940s. RP 351. Mr. Brown explained the difference between it and the Scanning Electron Microscope (SEM):

> If we had a perfect sample for the SEM, you can get better than four nanometer resolution. So it potentially has very good resolution. With the SEM, you're looking at the surface of the sample...
>
> With TEM, we can look at the…actual plains of atoms that…line up in the specimen…We can look at the plains of atoms. We can't see the atoms, but we can see the spacing between them.
>
> …
>
> For magnification and resolution, [the TEM is more appropriate].

RP 36.

Protocols for testing nanoparticulate material with the TEM were developed over 30 years ago. RP 377. The TEM is the primary tool used by scientists for nanomaterial imaging. RP 352-54. It is used by medical device

[38] He also holds a degree in forensic chemistry from Northeastern University. RP 349.

manufacturers. RP 354-55. It is also used by the Center for Disease Control to identify viruses. RP 355. The tire industry uses the TEM to size and grade different particles of soot. RP 355. Essentially, a particulate is collected on a series of filters, which are prepared for testing by scientists, who then place the sample into the TEM for analysis. RP 353. Solvents are used on the filter to separate any liquids, so the only remaining object on the filter is the particulate. RP 353.

Mr. Brown's 26 years' experience included working with polarized light microscopy, scanning electron microscopy, and transmission electron microscopy. RP 349. For example, his working group was provided a set of insulation manufacturing formulas, which had to be decoded, and samples to analyze to determine their origin. RP 349-50. During that process, scientists also had to advise courts and lawyers whether various insulation products were manufactured by a particular company, so that civil liability could be determined. RP 349-50. However, Mr. Brown had no knowledge of the TEM being used in a *criminal* forensic setting, asserting the instruments may be cost prohibitive for state crime laboratories. RP 355-56. Notwithstanding, there was no evidence as to any limitation, restriction, or accuracy issues regarding the TEM and Mr. Brown's analysis. RP 356.

Regarding MVA's testing procedures, control samples are compared to test samples for accuracy, and protocols are in place, when

testing materials, to avoid contamination. RP 357-359, 362-64. The validation, methodology, and protocols remain consistent for *any* scientific evaluation, whether criminal or civil. RP 376-77. Here, those procedures were used to test the AccuDure and shell casings and there is no scientific dispute regarding the protocol or procedures used by MVA. RP 359-60, 364, 374, 376. Mr. Brown declared there is no scientific debate about the methodologies, protocols, the laboratory reduction methods and processes for separating liquid from particulate, or the method by which conclusions are reached; they are generally accepted in the scientific community. RP 377. No contrary evidence was presented at the time of hearing.

In testing the AccuDure sample and the sample collected from the fired cartridges found at the crime scene, solvents were used to remove the oil from the powder particulate, and ultimately trapped the powder particulates onto a filter for analysis. RP 360, 367-68. The TEM was used to view the AccuDure reference material to determine its chemical composition. RP 362. The material contained magnesium silicon, which had a morphology (form and shape) like a cluster of grapes. RP 365. The reference sample of AccuDure[39] had the same morphology (magnesium silicon) as the substance found on the fired cartridges. RP 369.

[39] The observance of nano sized lead particles in the sample from the fired cartridges was different and distinguished from the magnesium silicon particles. RP 365, 392-93.

After the testing and analysis, Mr. Brown concluded:

> We did find particles on some of the shell casings that were magnesium and silicon with some aluminum. They were -- they were amorphous. They had the acini form morphology or appearance to them that the reference lubricant particles did. So in my report I said I did find particles on some of the shell casings that were consistent with the particles present in the lubricant.

RP 369.

However, Mr. Brown could not (and did not) conclusively state that the magnesium silicon particles observed on the fired cartridges originated from the AccuDure vial, to the exclusion of all other sources. RP 406.

In this case, the defendant's argument is like that raised and rejected in *State v. Noltie*, 57 Wn. App. 21, 786 P.2d 332 (1990), *aff'd,* 116 Wn.2d 831, 809 P.2d 190 (1991). At issue in *Noltie* was the admissibility of enlarged views of a child abuse victim's sex organs obtained using a colposcope, a microscope developed and used to diagnose cancer. *Id.* at 28-29. Division One of this Court concluded: "We find no basis for Noltie's contention that colposcopy constitutes a 'novel' field or scientific technique, even though its use in child abuse cases may be relatively recent." *Id.* at 29. It described the colposcope as "a magnifying glass with a fancy name" and concluded that it was not subject to the *Frye* test. *Id*. at 29-30.

Here, it was uncontroverted that the TEM's methodology and

application were scientifically reliable and generally accepted within the scientific community. It is of no consequence for the purposes of *Frye* that the technology is geared toward civil or criminal proceedings, or is not used in a courtroom; the defendant has failed to provide any authority to the contrary. The trial court did not err when it allowed the TEM evidence.

3. Conclusion of law "K"[40]

Offering no substantive authority, the defendant claims the TEM and the science behind it are not recognized in the "criminal forensic field" and, consequently, are not accepted within the relevant scientific field.

However, the relevant standard is whether the science is generally accepted within the "relevant scientific community"; Mr. Brown's uncontroverted testimony that the science underlying the TEM is generally accepted within the scientific community was sufficient to meet *Frye* and support conclusion of law "K."

The defendant claims Mr. Brown's opinion that the particulate extracted from the AccuDure sample was "consistent" with the particulate taken from the fired cartridges found in the residence is relevant to a *Frye*

[40] "The Court finds by a preponderance of the evidence that Mr. Schneck and Mr. Brown qualify as experts, that they have relied on theories that are generally acceptable in the scientific community, and that their testimony would be helpful to the trier of fact." CP 1144.

analysis. Such claims in other contexts have been summarily dismissed:

> [E]xpert testimony couched in terms of "could have", "possible", or "similar" is uniformly admitted at trial. The lack of certainty goes to the weight to be given the testimony, not to its admissibility. This is so, in part, because the scientific process involved often allows no more certain testimony.

State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1991), *abrogated on other grounds by State v. Schierman*, 415 P.3d 106 (Wash. 2018)

The defendant's reliance on *State v. Huynh*, 49 Wn. App. 192, 196, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988), is misplaced. In that case, the State's expert recovered gas, used as an accelerant, from a house fire and testified it "matched" gas found in the defendant's car. The defendant argued on appeal that the expert's opinion should have been excluded because the comparison technique used by the expert was not generally accepted in the scientific community. *Id.* at 194-95. The expert used a novel methodology of gas chromatography to compare the accelerant and gas from the defendant's car. The appellate court found that such a comparison of gasoline was "fraught with problems" based on testimony provided by defense experts. *Id* at 197. Ultimately, the appellate court held that the method for comparing gas samples was not generally accepted in *any* scientific community and its reliability and relevance was questionable, and admission of the expert's opinion was error.

As discussed above, the uncontroverted testimony in the present case was that the science underlying the TEM and the techniques employed in this case are both generally accepted within the scientific community and produce reliable results. RP 377. There was no evidence presented that there was any debate or question about the technique or the science behind comparing the samples in this case or its reliability. The trial court did not err when it admitted the testimony and results at trial.

M. THE $200 CRIMINAL FILING FEE MAY BE STRICKEN.

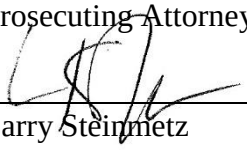
This Court may order the $200 court cost stricken from the judgment. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 5 day of March, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



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ATTACHMENT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. ROY H. MURRY WM 01/20/85 Defendant(s).	INFORMATION (INFO) No. 15102422-2 JOHN F. DRISCOLL JR Deputy Prosecuting Attorney PA# 15-9-56675-0 RPT# CT I - V: 001-15-0173100 RCW CT I - III: 9A.32.030(1)(A)AGG(10)-F (9.94A.825) (#23619) CT IV: 9A.32.030(1)(A)AT-F (9A.28.020(1)) (#23704) CT V: 9A.48.020(1)(B)-F (#04303)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, ROY H. MURRY, in the State of Washington, on or about May 26, 2015, with premeditated intent to cause the death of TERRANCE R. BARNETT-CANFIELD did cause the death of TERRANCE R. BARNETT-CANFIELD, a human being, said death occurring on or about May 26, 2015, and there was more than one victim, JOHN ROBERT CONSTABLE and LISA M. CANFIELD, and the murders were part of a common scheme or plan, as contained in Counts II and III, and the defendant being at said time armed with a firearm under the provisions of 9.94A.825 and 9.94A.533(3),

SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
SPOKANE, WA 99260 (509) 477-3662

Attach. A-1

COUNT II: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, ROY H. MURRY, in the State of Washington, on or about May 26, 2015, with premeditated intent to cause the death of JOHN ROBERT CONSTABLE did cause the death of JOHN ROBERT CONSTABLE, a human being, said death occurring on or about May 26, 2015, and there was more than one victim, TERRANCE R. BARNETT-CANFIELD and LISA M. CANFIELD and the murders were part of a common scheme or plan, as contained in Counts I and III, and the defendant being at said time armed with a firearm under the provisions of 9.94A.825 and 9.94A.533(3),

COUNT III: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, ROY H. MURRY, in the State of Washington, on or about May 26, 2015, with premeditated intent to cause the death of LISA M. CANFIELD did cause the deaths of LISA M. CANFIELD, a human being, said death occurring on or about May 26, 2015, and there was more than one victim, TERRANCE R. BARNETT-CANFIELD and JOHN ROBERT CONSTABLE and the murders were part of a common scheme or plan, as contained in Counts I and II, and the defendant being at said time armed with a firearm under the provisions of 9.94A.825 and 9.94A.533(3),

COUNT IV: ATTEMPTED FIRST DEGREE MURDER, committed as follows: That the defendant, ROY H. MURRY, in the State of Washington, on or about May 26, 2015, with intent to commit the crime of FIRST DEGREE MURDER as set out in RCW 9A.32.030, committed an act which was a substantial step toward that crime, by attempting to cause the death of AMANDA MURRY, a human being,

COUNT V: FIRST DEGREE ARSON, committed as follows: That the defendant, ROY H. MURRY, in the State of Washington, on or about May 26, 2015, did knowingly and maliciously cause a fire and explosion which damaged a dwelling, located at 20 E. Chattaroy, Colbert, Washington,

John T. Worrall Jr.
Deputy Prosecuting Attorney
WSBA #14606

DEFENDANT INFORMATION: ROY H. MURRY
Address: 17914 E 12TH AVE GREENACRES WA 99016-8669

Height: 6.02	Weight: 188	Hair: BRO
Eyes: BRO	DOL #:	State:
SID #: 21719731	DOC #:	FBI NO. 857812AC9

SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
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Attach. A-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. ROY MURRAY, Appellant.	NO. 35035-5-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 5, 2019, I e-mailed a copy of the Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
nodblspk@rcabletv.com

3/5/2019 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

March 05, 2019 - 1:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35035-5
Appellate Court Case Title:	State of Washington v. Roy Howard Murry
Superior Court Case Number:	15-1-02422-2

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